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No. 700

# In the Supreme Court of the United States

OCTOBER TERM, 1945

GEORGE HARRIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 145–152) has not yet been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered October 26, 1945 (R. 152), and a petition for rehearing was denied November 28, 1945 (R. 167). The petition for a writ of certiorari was filed December 28, 1945. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

1. Whether officers, who have arrested a person in his home in the execution of a valid warrant, may search the house for the instrumentalities of the crime of which the arrested person is accused.

2. Whether the instrumentalities of a wholly unrelated offense, accidentally discovered during such search, may be lawfully seized and used as evidence in a prosecution of the arrested person for such other offense.

3. Whether the search of petitioner's house was conducted in a reasonable manner.

## STATEMENT

Petitioner was indicted in the District Court for the Western District of Oklahoma in nineteen counts growing out of his possession of certain cards and certificates alleged to have been stolen from Local Draft Board No. 7 in Oklahoma City. Three counts charged him with stealing, concealing, and retaining with intent to convert to his own use, eight Notice of Classification cards and eleven Registration Certificates, all the prop-

erty of the United States Government, in violation of 18 U. S. C. 100 and 101 (R. 1–3). The next eight counts each charged that he did "falsely make, alter, forge or counterfeit a Notice of Classification card" by stamping it with an incorrect stamp of the draft board, in violation of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311, and Regulation 623.61–2 (R. 1, 3–10). The last eight counts charged that he did "retain in his possession with the intent to utter or publish as true" eight Notice of Classification cards which had been "falsely altered, forged or counterfeited" by being stamped with an incorrect stamp, also in violation of Regulation 623.61–2 (R. 1, 10–16).

Petitioner, alleging that the cards and certificates had been obtained by an illegal search and seizure, filed a timely motion to suppress them as evidence and a petition for their return (R. 18–22); on the same ground he filed a motion to quash the indictment (R. 33). The motions were denied, were renewed at the close of all the evidence at the trial, and were again denied (R. 34–36). Two of the counts involving violations of the Selective Service Regulations were dismissed by the Government, and the court, a jury trial having been waived (R. 34), found petitioner not guilty of stealing the cards as charged in the first count (R. 36). He was, however, found guilty on the other sixteen counts and was sentenced to imprisonment for five years on each, the sentences

to run concurrently (R. 36–37). The Circuit Court of Appeals for the Tenth Circuit affirmed the judgment (R. 152).

Petitioner did not take the stand and offered no evidence in his own behalf. The evidence for the Government pertaining to the issues raised in the petition for a writ of certiorari may be summarized as follows:

On July 15, 1944, two warrants were issued for the arrest of petitioner, one (R. 24–25) charging that he had used the mails in furtherance of a scheme to defraud the Mudge Oil Co., Dallas, Texas, of $25,000 (18 U. S. C. 338), and the other (R. 27–28) that he had caused a forged check for $25,000 to be transported in interstate commerce (18 U. S. C. 415). Armed with these warrants, two special agents of the F. B. I. went to petitioner's apartment in Oklahoma City at 1:30 p. m. on July 20, 1944, and placed him under arrest (R. 63–64, 84). The apartment consisted of a living room, bedroom, kitchen, and bath (R. 71), and petitioner was in the living room when arrested (R. 69). The warrants were read by petitioner, and the agents then proceeded to search the place in company with three associates who had arrived in the meantime (R. 64–65, 84). The object was to discover "any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type"

(R. 66, 77, 78, 84–85). In particular, the agents were looking for two $10,000 canceled checks of the Mudge Oil Co., which had been stolen from the offices of that company (R. 65). No checks of any type were found (R. 69), but the search turned up seven or eight pens, some tissue paper, and 27 pieces of celluloid which could be used to pick a Yale lock (R. 79–82, 86–87). In the course of the search the agents opened a bureau drawer in the bedroom; under some clothes they found a sealed envelope marked "George Harris, personal papers"; upon opening this they found the eight incorrectly stamped Notice of Classification cards and the eleven Registration Certificates, his possession of which formed the basis of his indictment and conviction in the present case (R. 66–67, 72, 77–78, 82–83, 85–86). The agents had no prior knowledge that petitioner possessed these cards (R. 75–76, 85). At the time they found them they knew that possession of them was a crime under the Selective Service Act (R. 83).

The agent in charge of the search described it as being "as thorough as we could make it"; it extended to all the rooms of the apartment, and to such details as the mattress, the carpets, and the clothes closet (R. 71–72, 86). While it was in progress, petitioner was handcuffed, but he was allowed to move around (R. 70, 73). The agent in charge left about 2:00 p. m. to obtain

search warrants for petitioner's car and office; he returned about 5:00 p. m. (R. 70–71). Another agent left the apartment for "some period of an hour or so" (R. 84). The search began shortly after the agents had arrived at 1:30 p. m. (R. 64–65), and petitioner was not taken away for arraignment until 6:30 or 7:00 p. m. (R. 71, 73). The agent in charge explained that "we were making arrangements with the United States Commissioner to arraign him as soon as possible, and we had some difficulty * * * in locating the Commissioner, so that is why we stayed out there longer than we would have otherwise" (R. 71).

## ARGUMENT

1. Petitioner admits that when a person has been legally arrested, the arresting officer may make a search and seize anything which it is unlawful for him to have and which may be used to prove the offense for which he is arrested, so long as it be found on his person or in his immediate control (Pet. 21, 26, 38); but petitioner contends, in effect, that where the arrest takes place in a room in a dwelling house, the search must be limited to that room and may not be extended to the other parts of a house (Pet. 4, 15, 21–26, 38). However, this Court has held that a home may be searched as an incident to a valid arrest therein, *Agnello* v. *United States*, 269 U. S. 20, 30, 32, 33, and it has further held that a search

may extend to all parts of the premises used for the unlawful purpose. *Marron* v. *United States*, 275 U. S. 192.[1] The protection of the Fourth Amendment is against "unreasonable" searches, and we submit that the ultimate question is not whether the search should be confined within a certain rigid locality but whether, under all the circumstances, it was reasonable. "There is no formula for the determination of reasonablness. Each case is to be decided on its own facts and circumstances." *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357. Consequently, we submit that under the decisions of this Court an officer who has made a valid arrest in a house may search all parts thereof if he has a sufficient reason to do so. If the whole house is under the immediate control of the arrested person, and if the search is strictly limited to the instrumentalities or the "fruits" of the offense for which the arrest is made, we think that a valid warrant of arrest affords authority for a search of the whole house.

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[1] Petitioner cites the *Marron* case; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); and *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463, in support of his contention that the search should be "limited." But the limitations spoken of in those cases relate to the things to be seized. In all of them the search extended beyond the room in which the arrest took place.

2. But petitioner contends that, even if it be permissible to search the entire house, any seizures must be limited to the instrumentalities of the offense for which the arrest is made, and may not be extended to matter which is merely evidential, or to instrumentalities of other offenses accidentally discovered during the course of the search (Pet. 4–5, 15, 28–37, 38–40). We agree as to objects which are evidential only, *United States* v. *Lefkowitz*, 285 U. S. 452, 464–466, and we shall endeavor to show in the next point that here the agents neither sought nor seized anything but the actual tools or fruits of crimes. However, we do not agree that officers, who are engaged in a reasonable search incidental to a valid arrest, must refrain from seizing the accidentally discovered means by which some other unrelated offense has been committed. It is axiomatic that when an offense has been committed in the presence of an officer, or when he has probable cause for believing that a felony has been committed, he has the right and the duty to arrest without a warrant. As an incident of that arrest, he may, and should, seize the instrumentalities or the fruits of the offense. It would be hypertechnical, then, to say that an officer who is conducting a legal search in connection with one crime may not seize the fruits of another crime when they are of such a nature as to convince him that the

second has been committed.[2] It is true that there is a statement in the *Lefkowitz* case to the effect that the authority of an officer to search a house contemporaneously with a lawful arrest therein "certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained." 285 U. S. at 464.[3] But there is a distinction between what is merely evidential and the means or the fruits of a crime. It has always been understood, as the *Lefkowitz* case points out,[4] that the former may not be seized, even under a search warrant. And what the *Lefkowitz* case meant was, as is clear from the facts involved, that an officer may not, in the execution of a valid warrant of arrest, search for and seize matter which is evidential only.

The issue here is whether an officer legally searching for the means of one crime may seize an object which is the means of another crime. When an object has been legally seized in con-

[2] In this case, the agent who discovered the cards testified that he was aware at the time that possession of them was a crime under the Selective Service Act (R. 83).

[3] 285 U. S. at 464, 465–466; and see *Boyd* v. *United States*, 116 U. S. 616, 622–624.

[4] Lefkowitz was arrested in his office by officers who held a valid warrant for him. They proceeded to make an "unrestrained" search of the office and seized a great many papers which "were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected." 285 U. S. at 464.

nection with one offense, it may then be used in prosecuting for another offense without the technicality of returning it to the owner, swearing out a new warrant and seizing it again. *Gouled* v. *United States*, 255 U. S. 298, 311–312. We think it likewise reasonable to permit the officer, who is engaged in a lawful search, and who happens upon the means of an unrelated crime in such a way as to give him probable cause to believe that the crime has been committed, to seize the object on the spot. No one, we think, would contend that an officer, who witnesses a felony while present in a home on a social visit must get a warrant before seizing the means of committing the crime. A number of circuit courts of appeals decisions have sanctioned seizures made under circumstances similar to those in the instant case. *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); *United States* v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 736 (C. C. A. 2); *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788; *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4); *Shelton* v. *United States*, 50 F. 2d 405 (C. C. A. 7); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586.

Of the cases cited by petitioner, *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9), and *Cofer* v. *United States*, 37 F. 2d 677 (C. C. A. 5), involved seizures of evidence; *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2), was

apparently also a seizure of evidence, and the Second Circuit has specifically recognized in the later case of *United States* v. *Poller*, 43 F. 2d 911, 913, that some of the language in the *Kirschenblatt* case must be modified in view of subsequent decisions of this Court. In the *Poller* case, in which certain papers were ordered returned, the agents do not seem to have had more than a suspicion that they were the instruments of a crime. In addition, in the still later *Matthews* case, *supra*, the Second Circuit specifically upheld a seizure which was in all material respects similar to the one involved here. None of the cases cited by petitioner support the proposition that an officer who searches a house under a valid warrant directing him to seize a gun may do nothing if he happens upon a supply of opium. A felony, concealment of the opium,[5] has been committed in his presence. Clearly it would be his duty to arrest the owner and to seize the contraband.[6]

3. Petitioner also contends that the search was unreasonable in that it was an unlimited ransacking of his home for the purpose of obtaining evi-

[5] 21 U. S. C. 174.

[6] In the *Marron* case, *supra*, this Court approved a seizure which went beyond the terms of a search warrant. The warrant directed seizure of intoxicating liquors and articles for their manufacture. Upon entry, the agents found that liquor was being sold. They arrested the proprietor, and as an incident to this arrest, seized a ledger which was "a part of the outfit or equipment actually used" to carry on the illegal business.

dence (Pet. 4, 14, 15–21, 37–40). As we noted above (*supra*, p. 7), the reasonableness of the search depends not upon formula but upon the circumstances of the particular case. *Go-Bart Co.* v. *United States*, 282 U. S. at 357; *In re Ginsburg*, 147 F. 2d 749 (C. C. A. 2).

We submit that this was a proper search for the instrumentalities of the crimes charged in the warrants of arrest. The agents testified that they were looking for the tools which petitioner had used in his confidence game (R. 66, 77), and specifically for checks, writing materials, and burglar tools (R. 65, 66, 77, 78). The agents had knowledge that petitioner had entered the locked offices of the Mudge Oil Co. at night (R. 100–123), that he had been in the office where the firm's checks were kept (R. 106), that two $10,000 canceled checks had been stolen from the offices (R. 65), and that shortly after his entry there he had placed in the mail a $25,000 check of the company which he knew to be forged (R. 23, 26). The search was necessarily "thorough," even to the extent of opening the envelope marked "Private Papers," since among the tools were the two canceled checks,[7] but there is no evidence that it

[7] As the circuit court of appeals said, "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered" (R. 150).

was destructive or unrestrained. And there is no evidence that anyone else lived in the apartment and was inconvenienced by the search. It is true that there were five agents and that they were in the apartment for about five hours. However, one agent was gone for about three hours (R. 70–71) and another was absent for about one hour (R. 84); and the agent in charge stated that they remained longer than necessary because of difficulty in locating the United States Commissioner (R. 71). The agents seized several pens and some tissue paper (R. 87), which are clearly instruments of forgery. They also seized 27 pieces of celluloid (R. 80). There was evidence that petitioner had entered the locked office of the Mudge Oil Co. (R. 100–123), and it was demonstrated to the court that these pieces of celluloid could be used to force similar locks (R. 81–82). Finally, the agents seized the Notice of Classification cards and Registration Certificates, possession of which they recognized as a crime (R. 83). In view of the nature of the things the agents were searching for, we think that the search was reasonable and that the arrest was not "used as a pretext to search for evidence"[8] as in the *Lefkowitz* and *Go-Bart* cases.[9]

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[8] *Lefkowitz v. United States*, 285 U. S. at 467.

[9] Petitioner also contends that the search was unlawful because the agents did not have probable cause for believing that the instrumentalities of the crimes charged in the warrants of arrest were in petitioner's apartment (Pet. 4, 15, 20–21, 26–28, 37–40). Probable cause has no relation to a search

4. Since petitioner insists (Pet. 5–8, 15–37 *passim*) that the decision of the court below is in conflict with decisions of this Court and of various circuit courts of appeals, we will briefly indicate the distinguishing characteristics of the cases cited. In the following cases, although the search warrant or the arrest was legal, the officers engaged in a search for evidence alone or in a general exploratory search with no specific object in view: *Boyd* v. *United States*, 116 U. S. 616; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Go-Bart Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452; *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2) (cf. pp. 10–11, *supra*); *United States* v. *Thomson*, 113 F. 2d 643 (C. C. A. 7); *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9).[4] In the following, the building was entered without a warrant and solely with the intent to make a search: *Weeks* v. *United States*, 232 U. S. 383; *Amos* v. *United States*, 255 U. S. 313; *Wakkuri* v. *United States*, 67 F. 2d 844 (C. C. A. 6); *Papani* v. *United States*, 84 F. 2d 160 (C. C. A. 9). In the following the warrant was invalid: *Byars* v. *United States*, 273 U. S. 28; *Veeder* v.

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made pursuant to lawful arrest. The right to make a lawful arrest carries with it, as the decisions heretofore cited establish beyond doubt, the incidental right of search. In any event, as the discussion in the text (pp. 12–13) shows, the knowledge which the agents had was sufficient to warrant them in their belief that the instruments of the offenses were in the petitioner's apartment.

*United States*, 252 Fed. 414 (C. C. A. 7), certiorari denied, 246 U. S. 675; *Honeycutt* v. *United States*, 277 Fed. 939 (C. C. A. 4); *Lawson* v. *United States*, 9 F. 2d 746 (C. C. A. 7). In *Cofer* v. *United States*, 37 F. 2d 677 (C. C. A. 5), a search warrant was issued for liquor but the officers deliberately sought guns and shells. In *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2) (cf. p. 11, *supra*), agents seized a number of papers upon arresting the defendant in his office; the court permitted them to retain those which were clearly the instruments of a crime, but ordered returned other papers which might have been the instruments of similar crimes; there is nothing in the opinion to show that the agents had anything more than mere suspicion that other crimes had been committed.

In the present case, on the other hand, the agents entered petitioner's home under valid warrants for the purpose of placing him under arrest. As an incident to that arrest, they searched the premises under petitioner's immediate control for certain specific objects which he had used in committing the crimes charged (cf. *Marron* v. *United States*, 275 U. S. 192). They accidentally discovered the cards and certificates, and knowing that possession of these was a crime, they seized them as the fruits of that crime.

## CONCLUSION

The decision of the circuit court of appeals is correct, no real conflict of decisions is involved, and hence there is no occasion for further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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